

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

**In Case No. 2000-520, Appeal of Thomas McCabe, the court upon
October 9, 2001, made the following order:**

Thomas McCabe's appeal in this case is dismissed as moot.

Appeal dismissed.

Brock, C.J., and Broderick, Nadeau, Dalianis, and Duggan, JJ., concurred.

**Howard J. Zibel,
Clerk**

Date of clerk's notice of decision: October 16, 2001

Distribution:

NH Personnel Appeals Board 00-0-4
Douglas N. Jones, Esquire
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Laura Mitchell, Supreme Court
File

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THE STATE OF NEW HAMPSHIRE
SUPREME COURT

In Case No. 2000-520, Appeal of Thomas McCabe, the court upon May 31, 2001, made the following order:

Certified copy of the record having been filed in the clerk's office, petitioner's brief must be filed on or before July 6, 2001; defendant's brief must be filed on or before August 5, 2001; cases will be assigned for oral argument based upon the date of filing of the appeal document. The earliest filed cases will be heard first.

NOTE: If you include an appendix to your brief, see Rule 17, please include only those portions of the record which you believe the court must consult while reviewing the brief. Also, do not include any portion of the record which has already been included in the notice of appeal or cross-appeal or any appendix thereto. In your brief, you may refer to the notice of appeal, cross-appeal, or appendix.

This order is entered by a single justice (Duggan, J.). See Rule 1.

Howard J. Zibel,
Clerk

Date of clerk's notice of decision: June 6, 2001

Distribution:

• NH Personnel Appeals Board
Attorney General
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State of New Hampshire



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APPEAL OF THOMAS MCCABE

Docket #00-O-4

Department of Safety, Division of Safety Services, Bureau of Marine Patrol

Response to Appellant's Motion for Rehearing with Attached

Proposed Findings of Fact and Rulings of Law

July 19, 2000

By letter dated July 12, 2000, SEA Field Representative Jean Chellis submitted a Motion for Rehearing with Attached Proposed Findings of Fact and Rulings of Law on behalf of Thomas McCabe. The appellant argued that the Board's June 14, 2000 decision contained errors of fact and law, and that the Board's decision should be withdrawn as a result. In the alternative, Ms. Chellis requested that the Board adopt the appellant's proposed findings of fact and rulings of law, and grant such other relief that may be just and proper.

The State's Objection to the Motion was received by the Board on July 18, 2000. In that Objection, Attorney Kelloway argued that the appellant failed to show good reason within the motion why the Board's order should be considered unlawful or unreasonable. She argued that the appellant, having been fully apprised of the manner in which the appeal was to be heard, was given a full and fair opportunity to present his appeal, without limitation upon or exclusion of any evidence offered by the parties. She argued that the appellant effectively waived any opportunity to raise procedural or due process arguments, having failed to do so at any time prior to the issuance of the Board's decision on June 14, 2000. Ms. Kelloway asked the Board to deny the instant Motion for Rehearing.

Having considered the arguments offered by both parties, the Board voted unanimously to deny the appellant's Motion for Rehearing. In so doing, the Board responds as follows to those arguments raised by the appellant in support of the motion.

Alleged Errors of Fact

1. The Board's Findings of Fact begin on page 7 of the Board's decision, and the alleged error does not appear under the Board's Findings of Fact. Captain McCabe, speaking on his own behalf at the hearing on May 24, 2000, stated, "As a practical matter I'm losing compensation as we speak... overtime is one aspect, holidays-- I've worked every fourth of July, every Memorial Day, every Labor Day. I've been called out for boating accidents..."
2. The Board was neither a party to the settlement negotiations nor a witness to discussions between Captain McCabe and the Department, and the results of those discussions are not part of the record of the appeal. If, as the appellant now asserts, the State misrepresented the substance of those discussions, it was the appellant's obligation to raise the issue or question the State's credibility at the hearing. If the appellant needed to call or cross-examine a witness on that point, it was the appellant's obligation to raise that issue at the hearing.
3. Commissioner Flynn's affidavit was admitted into evidence without objection by the appellant. If, as the appellant now asserts, the statements contained therein do not accurately reflect discussions between the appellant and Commissioner Flynn, the appellant had every opportunity at the hearing to object to admission of the affidavit, or to request that Commissioner Flynn be called as a witness.
4. State's Exhibit 5, a May 4, 1999 letter from Ms. Chellis to the Board in Captain McCabe's earlier reclassification appeal (Docket #99-C-19), states, "Captain McCabe has been charged with developing a long-range plan to provide boating education classes for any boater who desires to complete one." The scope of the mandatory boater education program does not alter the fact that the nature of the assignment is consistent with Captain McCabe's current position classification. The remainder of the appellant's arguments, including those concerning what would constitute a new position, were raised by the appellant at the hearing on the merits of the appeal and considered by the Board in reaching its decision denying Captain McCabe's appeal of his duty assignment.

5. See #4 above.
6. The appellant did not identify any personnel rule or provision of the collective bargaining agreement that requires an agency to adjust a supplemental job description before assigning new or additional work. As the Board's decision indicates, RSA 21-I:42, XIII (d) requires advance notice of assignments prior to an evaluation of how those assignments are performed.
7. A motion for rehearing should set forth specifically why a decision or order of the board is unlawful, unreasonable, or unjust. Restating the arguments raised on appeal, realleging or reincorporating all prior pleadings, attachments, submissions, testimony and argument does not constitute a basis upon which to find that the Board's decision was unlawful or unreasonable.

Alleged Errors of Reasoning

1. Positions are not created through memoranda between a division director and a subordinate employee. Similarly, direction to an agency to update an employee's supplemental job description does not mean that the agency has violated the Personnel Rules regarding supplemental job descriptions.
2. The appellant has reiterated issues already raised by the appellant at the hearing on the merits of the appeal, and considered by the Board in reaching its decision to deny Capt. McCabe's appeal.
3. PART Per 302 01 (a) states, "In order to communicate changes in an organizational structure which affect the classification of positions, an appointing authority shall maintain an organizational chart describing the reporting relationships of all positions in the agency" (emphasis added). There is no evidence of changes that have affected the classification of positions within the Department.
4. The elements of a class specification include a definition of a position's basic purpose and a list of duties and responsibilities that are characteristic of the job functions of the class. [(Per 301.02 (c)] The elements of a supplemental job description include a statement of the scope of work for the particular position and a listing of at least five accountabilities that fall within the scope of work for the position. It is neither unreasonable nor unjust to find that the scope of work is consistent with the position classification, but that the appellant is entitled to receive a more detailed set of accountabilities and expectations that support it.

5. The Board's decision neither finds nor implies a violation of the Rules of the Division of Personnel. Captain McCabe expressed concerns about being evaluated on the basis of work assignments that were not reflected in his supplemental job description. The Board's decision indicates that the Personnel Rules provide a mechanism for addressing his concerns.

6. See #4 and #5 above.

7. A motion for rehearing should set forth specifically why a decision or order of the board is unlawful, unreasonable, or unjust. Restating the arguments raised on appeal, realleging or reincorporating all prior pleadings, attachments, submissions, testimony and argument does not constitute a basis upon which to find that the Board's decision was unlawful or unreasonable.

Alleged Errors of Law

1. The appellant offered no objection at any time prior to, during, or after the hearing with respect to the appropriate notices, applicable administrative rules, or the manner in which the Board would receive evidence in this case.

2. In its customary hearing notice, the Board advised the parties that the appeal would be heard by the Board on offers of proof by the representatives of the parties or the parties themselves. The parties were advised that they would be allowed to submit documentary evidence, make offers of proof, and present oral argument. The Board also advised the parties that the Board could vote to compel the production of additional evidence, up to and including the testimony of witnesses, if the Board found insufficient evidence upon which to fairly decide the appeal.

3. The appellant failed to offer evidence or argument to support a claim that there were violations of the letter or the intent of the statutes or rules governing his employment or his right to a fair hearing that have deprived him of due process or of any right to which he is entitled as a classified state employee.

4. A motion for rehearing should set forth specifically why a decision or order of the board is unlawful, unreasonable, or unjust. Restating the arguments raised on appeal, realleging or reincorporating all prior pleadings, attachments, submissions, testimony and argument does not constitute an basis upon which to find that the Board's decision was unlawful or unreasonable.

For the reasons set forth above, the Board voted unanimously to deny the appellant's Motion for Rehearing. Having issued Requests for Findings of Fact and Rulings of Law in its decision dated June 14, 2000, the Board declines to issue further findings of fact and rulings of law as requested by the appellant.

THE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Lisa A. Rule, Commissioner



Robert J. Johnson, Commissioner

cc: Thomas Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301
Atty. Sheri J. Kelloway, Litigation Office, Department of Safety, 10 Hazen Dr., Concord,
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APPEAL OF THOMAS J. McCABE, Jr.

Docket #00-O-4

Department of Safety, Division of Safety Services

June 14, 2000

The New Hampshire Personnel Appeals Board (Wood, Rule and Barry) met on Wednesday, May 24, 2000 under the authority of RSA 21-I:58, to hear the appeal of Thomas J. McCabe, an employee of the Department of Safety. Captain McCabe, who was represented at the hearing by SEA Field Representative Jean Chellis, was appealing his re-assignment as the Program Administrator for the State's new Boater Education Program. Attorney Sheri J. Kelloway appeared on behalf of the Department of Safety.

Before admitting any exhibits into the record or accepting any arguments or offers of proof, Chairman Wood advised the parties that he had had numerous official dealings with Captain McCabe over the years and held him in high regard. Chairman Wood asked if either party objected to his sitting on the panel to hear the appeal. Neither party objected.

Without objection, the appeal was heard on oral argument and offers of proof by the representatives of the parties. The record of the hearing in this matter consists of pleadings submitted by the parties, notices and orders issued by the Board, the audio tape recording of the hearing on the merits, and documents admitted into evidence as follows:

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State's Exhibits

1. Supplemental Job Description, position #10676
2. HB 449-FN - Final Version
3. Amendment to SB 337-FN
4. Performance Summary for Thomas McCabe dated 2/25/94
5. April 14, 1999, notice of appeal from Jean Chellis to the Personnel Appeals Board concerning Captain McCabe's reclassification
6. March 17,2000, memo from Director David T. Barrett to Captain Thomas J. McCabe concerning "Boater Education Program"
7. March 31,2000 memo from Director David T. Barrett to All Division Personnel concerning "Reorganization"
8. Affidavit of Commissioner Richard M. Flynn

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Appellant's Exhibits

1. March 17,2000, Memorandum from Director David T. Barrett to Captain Thomas J. McCabe
2. House Bill 449 Requiring Boater Safety Education
3. March 31,2000, Memorandum from Director David T. Barrett to All Division Personnel regarding Reorganization
4. Supplemental Job Description for Thomas J. McCabe approved by the Division of Personnel on March 29,1999
 - A. March 17,2000, Memorandum from Director David T. Barrett to Captain Thomas McCabe
 - B. April 6,2000, memo from Director David T. Barrett to Marine Patrol Personnel transmitting the MPO Call Number List
 - C. April 16, 1997, letter from Commissioner Richard Flynn to former Personnel Director Virginia Lambertson requesting approval of title changes in the Bureau of Marine Patrol
 - D. April 24,2000, Letter from W.R. Ladd to Timothy Dunleavy
 - E. March 31,2000, memo from Director David Barrett to All Division Personnel concerning Reorganization

- F. April 11,2000, memo from Sgt. Stephen Kace to Lt. Mark Gallagher concerning Boater Education Class
- G. Excerpts from classification questionnaires for the positions of Marine Patrol Lieutenant and Marine Patrol Sergeant
- H. September 28, 1999, memo with attachment from Director David T. Barrett to Captain Thomas McCabe concerning NASBLA Representation
- I. May 4, 1999, letter from Jean Chellis to the Personnel Appeals Board concerning Captain McCabe's request for reclassification
- J. January 19,2000, decision of the Personnel Appeals Board in the Appeal of Thomas McCabe, Docket #99-C-19
- K. Class specification for Marine Patrol Captain and supplemental job description for position #10676, Marine Patrol Captain
- L. April 25,2000, memo fi-om Director David Barrett to Sgt. Peter Hamilton concerning the Marine Patrol Emergency Call List
- M. Blank Department of Safety, Bureau of Marine Patrol training certificate
- N. May 3,2000, memo from Director David T. Barrett to Captain Thomas McCabe and Lt. Mark Gallagher concerning scheduling

Motion to Dismiss

The State, in its Motion to Dismiss, argued: "It is clearly within management prerogative to reassign duties and responsibilities on a temporary basis to accomplish mandates set forth by the Legislature without constituting a violation of the Personnel Rules. Consequently, since Appellant was not 'affected by any application of the personnel rules,' as required by RSA 21-I:58, I, Appellee respectfully submits that this Board lacks jurisdiction to hear this appeal, since it falls outside the Board's statutory authority, which this Board has consistently taken very seriously." [State's Motion, page 6 ¶ 16]

In response, Appellant argued that, "The collective bargaining agreement clearly recognizes management's prerogative to reassign duties and responsibilities., However, this prerogative

must be exercised 'subject to the provisions of law, personnel regulations, and the provisions of this Agreement.' See Collective Bargaining Agreement, Article II, 2.1 and 2.1.2. As stated in its original appeal and this answer to Appellee's Motion to Dismiss, the Appellant is affected by the application of the personnel rules as stated therein. Consequently, the Board clearly has jurisdiction pursuant to RSA 21-I:58." [Appellant's Objection, p. 6 ¶ 16] Appellant also argues that, "The appellee has not only violated several important personnel rules, it has also created a unilateral management prerogative to reassign duties and responsibilities so long as its actions are 'temporary.' Dismissal of this appeal creates the dangerous precedent of allowing management to violate the personnel rules and collective bargaining agreement under the guise that its actions are merely temporary. Clearly, the appointing authority has made a judgment that a boating education program administrator is necessary to tackle the daunting task of implementing HB 449. The Appellant is merely asking the Board to require management to follow the proper laws and rules in establishing such a position." [Objection pp. 6-7 ¶17]

Reassignment

Ms. Chellis argued that the Department of Safety violated Captain McCabe's rights by assigning him, without his consent, to perform duties that are neither reflected in his supplemental job description nor characteristic of the classification of Marine Patrol Captain. Ms. Chellis also argued that although the Department of Safety had referred to Captain McCabe's assignment to the Boater Education Program as a temporary assignment, the department would not specify how long a period of time the assignment would cover.

Ms. Kelloway argued that the Board should dismiss Captain McCabe's appeal as a matter outside the Board's subject matter jurisdiction in that Captain McCabe had retained his salary and his rank and had suffered no penalty as a result of being assigned to the new Boater Education Program. She argued that because Captain McCabe had not been affected by an application of the rules, he had no standing to appeal under the provisions of RSA 21-I:58.

Ms. Kelloway argued that the appointing authority, not the employee, decides what tasks an employee will perform. She argued that an agency head's decision concerning specific duty assignments was not a decision subject to appeal under the provisions of RSA 21-I:58, and she suggested that the Board would be setting a dangerous precedent if it were to step into the appointing authority's shoes in matters involving the agency's day-to-day operations or specific employee work assignments. On that basis, Ms. Kelloway again argued that the appeal should be dismissed.

The Appellant disagreed, arguing that by assigning him to develop and implement the Boater Education Program, the Department of Safety had affected him financially. Captain McCabe indicated that Marine Patrol Personnel earn significant amounts of over-time and compensatory time for working on holidays and weekends, and that he had earned additional over-time compensation reviewing accident reports and investigations. Captain McCabe told the Board, "As a practical matter, I'm losing compensation as we speak."

The Board reviewed the legislative language establishing the safe boater certification requirement, as well as correspondence with Captain McCabe about his being assigned to develop and implement the program. The Board suggested that such an assignment appeared to be a "feather in his cap." The Board asked Captain McCabe whether it was the compensation or the work itself that made the new assignment undesirable.

Captain McCabe discussed the personal financial consequences of taking such a position and not having access to over-time during the regular boating season. He indicated, however, that he would be very interested in developing and implementing the Boater Education Program if the State would match his last three years' earnings, including salary plus overtime, benefits, and a vehicle.

Ms. Kelloway stated that there was no prohibition against Captain McCabe earning overtime compensation in his new assignment if such overtime was required for the program's success. However, she said, the Department would have no way of knowing in advance precisely how

much overtime might or might not be required in developing and implementing the Boater Education Program. Ms. Kelloway also argued that the appointing authority retains sole right to determine when and to whom overtime will be assigned.

Ms. Kelloway argued that by virtue of his education and experience, Captain McCabe was the logical choice to develop and implement the State's new Boater Education Program. She asked the Board to note that in his earlier request for reclassification and on appeal to this Board (PAB Docket #99-C-19), Captain McCabe had used his responsibilities for development of boating education programs to support his request for upgrading. Some of those responsibilities were described in State's Exhibit 5 as follows:

"Captain McCabe has been charged with developing a long-range plan to provide boating education classes for any boater who desires to complete one. The Captain worked with the National Association of [State] Boating Administrators in developing this program and then assigned a subordinate to make it work. In pursuing the long-term goal, the Captain has made plans to enter into a memorandum of understanding with the United States Power Squadron and United States Coast Guard Auxiliary. As a result of these memorandums, the long-range plan will be achieved with a significant increase in the number of boating safety programs available to the public. A positive by-product of this plan will be sworn personnel being freed up to perform other functions."

Ms. Chellis argued that the above argument was intended to support an increase in points allocated to the classification's Supervision factor in order to support an overall increase in the salary grade assigned to the position. She noted that in its decision, the Board did not agree that the Supervision factor should be increased. She argued that the actual responsibilities for developing the boating education curriculum and certifying instructors had been delegated to the Marine Patrol Lieutenant and Sergeant. As such, she argued, either of those positions could have been assigned to develop and implement the new educational program. She also asked the Board to note that Director Barrett had replaced Captain McCabe as the State's representative to the National Association of State Boating Law Administrators.

Having considered the evidence, arguments and offers of proof, the Board made the following findings of fact and rulings of law:

Findings of Fact

1. Thomas McCabe is currently employed by the Department of Safety as a Marine Patrol Captain.
2. According to the Department of Safety's 1997-1999 Biennial Report [<http://www.state.nh.us/safety/9799ss.html>], "The Division of Safety Services in Gilford, New Hampshire ... is comprised of the Bureau of Marine Patrol, the Moorings Program, and the Bureau of Tramway and Amusement Ride Safety. " The report states, in part, "The Division of Safety Services provides services on all public waters throughout the state, including the seacoast area, which includes 158 miles of shore line. Responsibilities include education, placement and maintenance of navigational aids and enforcement of boating and other laws on the state's waterways. "
3. HB-449-FN, approved on April 17, 2000, "requires that persons born after a specified date possess a safe boater education certificate." [State's Exhibit 2, p. 1]
4. The requirements for possession of a safe boater education certification are phased-in over a period of six years, beginning on January 1, 2002
5. In a letter dated May 4, 1999 submitted to the Board in support of Captain McCabe's classification appeal (PAB. Docket #99-C-14), Ms. Chellis described Captain McCabe's responsibility within the Bureau of Marine Patrol for the "development of a long-range plan to provide boater education classes to every boater who desires such training." [State's Exhibit 5]
6. The "Basic Purpose" outlined in the class specification for the position of Marine Patrol Captain (Appellant's Exhibit K) is, "To analyze, interpret and evaluate strategies for effective enforcement of navigational laws and water safety regulations."
7. Three of the eight "Characteristic Duties and Responsibilities" found in the Marine Patrol Captain class specification are: "Analyzes and interprets boating laws and regulations and recommends methods for improving public safety and protection," "Develops brochures,

pamphlets and other informational material for use in explaining safe boating practices and laws or dangerous boating practices to the public," and "Develops and conducts training programs in boating education or related topics."

8. Captain McCabe's supplemental job description includes a disclaimer statement, as required by Per 301.03 (d) (11), that reads, "The supplemental job description lists typical examples of work and is not intended to include every job duty and responsibility specific to a position. An employee may be required to perform other related duties not listed on the supplemental job description provided that such duties are characteristic of that classification."
9. Responsibility for developing and implementing a boater safety education program is consistent with the function of the Bureau of Marine Patrol, and consistent with the characteristic duties and responsibilities of Captain McCabe's current position classification.
10. HB-449-FN does not create any new positions. Instead, it provides that, "The commissioner [of safety] may appoint one or more training specialists who shall assist in establishing safe boater education courses throughout the state, support and implement program guidelines and supervise instructors." [RSA 270-D:10, IV]
11. In a March 17, 2000 memorandum addressed to Captain McCabe, Safety Services Director David Barrett informed the Appellant that he had found it "necessary to make personnel changes in order to accomplish the requirements set out in HB 449." He also wrote that the Division would "need someone who is able to work closely with the other major conduits of boater education; specifically, the Coast Guard Auxiliary and the US Power Squadron." [State's Exhibit 6]
12. Director Barrett advised Captain McCabe that all of his Marine Patrol responsibilities would be assigned to the remaining staff so that Captain McCabe could, "devote [his] entire efforts to making New Hampshire's Boater Education Program a resounding success." [State's Exhibit 6]
13. In a memo dated March 31, 2000, addressed to All Division Personnel, Director Barrett refers to the assignment of Captain McCabe to the "newly created position of Program Administrator," and assignment of Lt. Mark Gallagher, effective April 21, 2000, to "the position of acting Bureau Chief." [State's Exhibit 7]

14. Safety Commissioner Richard M. Flynn stated, in an affidavit dated May 21, 2000, that HB 449 did not create any new positions to support the boating safety education program. He stated that as a result, he had to assign someone from his agency who had the educational background and boating experience necessary to implement the program. [State's Exhibit 8]
15. Commissioner Flynn stated that he had a conversation with Captain McCabe prior to his reassignment. Commissioner Flynn stated that Captain McCabe's concerns about losing overtime had been discussed, and that he had advised Captain McCabe that "he may still get overtime because of the magnitude of the project." Commissioner Flynn indicated that Captain McCabe did not express any objection to the assignment.
16. Commissioner Flynn stated that Captain McCabe's "...duties and responsibilities have simply been temporarily changed, which is within management prerogative, in order for him to complete a project which is very important to this agency and to the New Hampshire General Court."
17. Captain McCabe did not receive a supplemental job description outlining the specific duties and responsibilities associated with his reassignment, nor was he apprised of how long the assignment was expected to last.
18. Captain McCabe has retained his position title and salary grade.

Rulings of Law

- A. "Overtime" means authorized work in excess of an established basic workweek. [Per 102.391]
- B. "Supplemental job description" means a document identifying the scope of work, duties, and accountabilities of an agency-level position falling within a specific class. [Per 102.591]
- C. "Temporary appointment" means an appointment of a qualified candidate to a position that is known to be of limited duration. [Per 102.621]
- D. An appointing authority shall not make any permanent transfer of positions from one department, division, bureau, section, or subsection to another without the approval of the director who shall review the transfer in relation to the statewide classification plan. [Per 302.02 (a)]

- E. Prior to making any transfer or reassignment of positions, the appointing authority shall state in writing to the director which positions are affected by the proposed transfer or reassignment and the reasons for the proposed change. The director shall review the request to ensure that the transfer or reassignment is related to job functions and does not have as its basis a punitive intent. [Per 302.02 (b)]
- F. The duties and work assignments for each position in the state classified service shall be defined by a supplemental job description in the format established by this rule. [Per 301.03 (a)]
- G. [Employee Performance] Evaluations shall be based upon specific written performance expectations or criteria developed for the position in question and employees shall be made aware of these performance expectations in advance of any evaluation. [RSA 21-I:42, XIII, (d)]
- H. An appointing authority, or full time employee who believes that a revision to the supplemental job description might affect the classification of the position, shall have the option to request a determination from the director under RSA 21-I:54, III, provided the revision is a permanent work assignment which affects 10 percent or more of the total working time of the position. [Per 301.03 (l)]
- I. An appointing authority may file a request for temporary reallocation or reclassification of a position when a job assignment of limited duration affecting more than 10 percent of the total working time has been delegated to the position. [Per 303.07 (a)]
- J. At the end of 6 months, one or both of the following actions shall take place: (1) The appointing authority shall adjust the incumbent's salary to the rate of the original classification by assigning the new step in accordance with Per 901.07 (b); and (2) If the original change in job assignments initiating the request for temporary reallocation or reclassification is still in effect, the appointing authority shall file a completed request for reallocation or reclassification under Per 303.02. [Per 303.17 (g)]
- K. Any work assignment which affects more than 10 percent of the total working time of the position shall be listed on the description by the appointing authority, designated supervisor or the employee of the position in accordance with this rule. [Per 301.03 (c)]

L. Any permanent employee who is affected by any application of the personnel-rules, except for those rules enumerated in RSA 21-I:46, I and the application of rules in classification decisions appealable under RSA 21-I:57, may appeal to the personnel appeals board within 15 calendar days of the action giving rise to the appeal. ... [RSA 21-I:58, I]

Decision and Order

The evidence does not support Appellant's original assertion that the Department of Safety created a Program Administrator position, with or without the approval of the Governor and Council. Accordingly, any claims predicated upon that assertion, including the allegation that the Department of Safety violated RSA 21-I:54 or the Rules of the Division of Personnel with respect to creating a position, position postings, selection to fill a vacancy, or transfer of an employee into a vacant position, are dismissed.

Similarly, the evidence and arguments do not support the Appellant's allegation that the Department of Safety engaged in "a form of discrimination and limitation for non-merit factors," or that the Department of Safety violated the Rules of the Division of Personnel by assigning Captain McCabe to develop the Boater Education Program. The evidence reflects that the Department of Safety complied with the Rules of the Division of Personnel in temporarily assigning Captain McCabe to perform duties that are consistent with his position classification, and for which he is obviously qualified. In that respect, Captain McCabe's appeal, and his request for the Board to issue an order immediately returning him to "perform his position as Bureau Chief with full authority to enforce bureau SOP's including the chain of command" is DENIED.

The parties agree that management retains the right to reassign tasks and responsibilities, provided that the assigned tasks are consistent with the "basic purpose" and "characteristic duties and responsibilities" in the employee's class specification. The basic purpose of the Appellant's current classification is "To analyze, interpret and evaluate strategies for effective enforcement of navigational laws and water safety regulation." Development and implementation of the safe

Boater Education Program is an integral function of analyzing, interpreting and evaluating such strategies. Furthermore, according to Captain McCabe's May 4, 1999 classification appeal submissions, the Appellant was responsible at the time of his position review for "developing a long-range plan to provide boating education classes for any boater who desires to complete one." Therefore, on the evidence, argument, and offers of proof, the Board found that Captain McCabe's newly assigned responsibilities are consistent with the basic purpose of the Marine Patrol Captain classification

Captain McCabe expressed concerns about his compensation, the scope of his responsibilities, and the length of his assignment to the safe Boater Education Program. Ms. Chellis argued that the Appellant had not been provided with a supplemental job description addressing his new responsibilities. Those issues can each be addressed by remedies available in the Personnel Rules.

Per 301.03 provides that every position in the State classified service shall have a supplemental job description that includes, "Any work assignment which affects more than 10 percent of the total working time of the position." Although the Department of Safety has described, in a general sense, its expectations for Captain McCabe's new work assignment, the Appellant is entitled to a more specific set of accountabilities and job expectations. An accurate and up-to-date job description benefits both the employer and the employee, providing the criteria upon which an employee's performance is then evaluated. The Department of Safety should immediately undertake discussions with Captain McCabe so that an accurate job description can be developed and submitted for approval by the Division of Personnel.

If either Captain McCabe or the Department of Safety believes that the revised supplemental job description refers to permanent work assignments affecting 10 percent or more of the total working time of the position, either one can request a review of the position by the Director of Personnel for reclassification or reallocation of the position in accordance with Per 301.03 (1). In the alternative, Per 303.07 (a) establishes a mechanism whereby an appointing authority may request the temporary reallocation or reclassification of a position "when a job assignment of

limited duration affecting more than 10 percent of the total working time has been delegated to the position." According to Per 303.07 (b), "A request for temporary reallocation or reclassification shall include the following information: (1) A proposed supplemental job description detailing specific job accountabilities to be performed; (2) An explanation of why the temporary reallocation or reclassification is needed; and (3) The proposed ending date of the temporary job assignment."

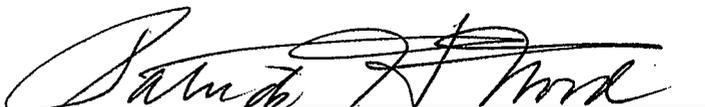
A request for temporary reclassification or reallocation would also address the Appellant's concerns about the duration of the assignment. Per 303.07 (c) further provides that, "The temporary reallocation or reclassification of a position shall not exceed 6 months." Should the tasks assigned during the temporary reallocation or reclassification extend beyond 6 months, the appointing authority is then required to complete a request for permanent reclassification or reallocation of the position.

With respect to Captain McCabe's concerns about over-time compensation, the Board appreciates the Appellant's interest in maintaining his current level of income, as well as retaining the benefits associated with his position, such as the use of a State vehicle. The State indicated that Captain McCabe continues to have the use of a State vehicle and, as Commissioner Flynn's affidavit indicates, may still be required to perform overtime work because of the magnitude of the project to which he has been assigned. However, regardless of the nature of the Appellant's assignments, approval of overtime assignments remains within management's authority. Unless the Appellant can allege a specific violation or misapplication of the Rules, assigning or approving overtime is a matter beyond the Board's jurisdiction.

Ms. Chellis argued in the Objection to the State's Motion to Dismiss that, "Clearly, the appointing authority has made a judgment that a boating education program administrator is necessary to tackle the daunting task of implementing HB 449. The Appellant is merely asking the Board to require management to follow the proper laws and rules in establishing such a position." As Ms. Kelloway argued, until the boating education program has been designed and developed, the Department will not know what staffing it will require for successful operation.

At the hearing on May 24,2000, the Board had recommended that the parties attempt to reach a settlement agreement that would satisfy both the Department's needs to develop and implement the Boater Education Program, and the Appellant's concerns about his classification, compensation and work assignments. In the absence of such an agreement by the parties, the Board found that the most appropriate course of action would be for the Department to request a review of the position by the Director of Personnel in accordance with Per 301.03 or Per 303.07 of the Rules of the Division of Personnel. The Director can then determine if the current level of classification and compensation is consistent with the assigned duties and responsibilities of the position. If the Director determines that the newly assigned duties require reclassification of the position, then either the Appellant or the agency can appeal that decision under the authority of RSA 21-I:57.

THE NEW HAMPSHIRE PERSONNEL APPEALS BOARD



Patrick H. Wood, Chairman



Lisa A. Rule, Commissioner



James J. Barry, Commissioner

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301
Jean Chellis, SEA Field Representative, PO Box 3303, Concord, NH 03302-3303
Atty. Sheri J. Kelloway, Commissioner's Office, Department of Safety, James H. Hayes
Safety Building, 10 Hazen Dr., Concord, NH 03305

State of New Hampshire



PERSONNEL APPEALS BOARD
25 Capitol Street
Concord, New Hampshire 03301
Telephone (603) 271-3261

Appeal of Thomas McCabe

Docket #00-O-4

Department of Safety, Bureau of Marine Patrol

By letter dated April 14, 2000, SEA Field Representative Jean Chellis filed an appeal on behalf of Capt. Thomas McCabe of the Bureau of Marine Patrol, Department of Safety. In that appeal, Ms. Chellis argued that the Department of Safety violated state law and the Rules of the Division of Personnel by removing Capt. McCabe from his assignment as the Marine Patrol Bureau Chief, and reassigning him to act as the Program Administrator for the State's new Boating Safety Education program. Specifically, Ms. Chellis argued that the Department committed the following violations:

1. Creation of a new position of Program Administrator without the prior approval of the Governor and Council in violation of RSA 21-I:54;
2. Filling the Program Administrator position without first posting the position in-house for a period of 5 days;
3. Transferring Capt. McCabe to the Program Administrator position without the approval of the Director of Personnel;
4. Assigning Capt. McCabe to perform duties that are not characteristic of his Marine Patrol Captain classification; and
5. Assigning Lt. Gallagher to fill Capt. McCabe's Marine Patrol duties without the Personnel Director's approval prior to announcing the staffing change.

The Personnel Appeals Board (Wood, Rule and Barry) met on Wednesday, April 26, 2000, to review that appeal and Ms. Chellis' request for the Board to issue an order to the Department of Safety to file an immediate response..

In accordance with Per-A 202.03 of the Rules of the Personnel Appeals Board, the Board requests that the Department of Safety respond to the specific allegations contained in the appellant's notice of appeal, as summarized above. The Board further requests that the Department of Safety submit its response to the appellant and to the Board not later than May 16, 2000, so that the response will be available for preliminary review by the Board at its meeting on May 17, 2000, in preparation for the hearing now scheduled for Wednesday, May 24, 2000.

FOR THE PERSONNEL APPEALS BOARD



Mary Ann Steele, Executive Secretary

cc: Thomas F. Manning, Director of Personnel, 25 Capitol St., Concord, NH 03301
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